Supreme Court, U.S.
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No. 92-730

In The

Supreme Court of the United States

October Term, 1992

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS;
Freelove Peterson (Widow),
Paul Peterson (Decedent),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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36 pp

QUESTION PRESENTED

The question presented is:

Whether the court of appeals correctly affirmed the decision of the Benefits Review Board which held that section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), as amended in 1972, applies to a 1985 injury.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were: the petitioner, Insurance Company of North America; the respondent, U.S. Department of Labor, Office of Workers' Compensation Programs; and the claimant-respondents, Paul Peterson (decedent) and Freelove Peterson (widow).

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BRIEF IN OPPOSITION

The Claimant-Respondents, Freelove Peterson (widow) and Paul Peterson (decedent) file this Brief in

Opposition to the Petition for a Writ of Certiorari filed by the Insurance Company of North America ("INA").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 969 F.2d 1400 and is reproduced in the Appendix to the Petition at 27a. The opinion of the Benefits Review Board is reported at 25 BRBS 71 (1991) and is reproduced in the Appendix to the Petition at 15a. The opinion of Administrative Law Judge Martin J. Dolan is reproduced in the Appendix to the Petition at 5a.

COUNTERSTATEMENT OF THE CASE

The underlying dispute between the parties concerns a claim for benefits made on behalf of the claimant-respondents pursuant to the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. sections 901 *et seq*. The claim arises out of Paul Peterson's employment in submarine construction with the Electric Boat Division of the General Dynamics Corporation on the Thames River in Groton, Connecticut

between November, 1962 and January, 1967. While employed at Electric Boat, Peterson worked as a carpenter primarily in the model and joiner shops located adjacent to the navigable waters of the Thames River. In the model shop, Peterson was responsible for building scaled down models of specific components on the submarines. In the joiner shop, he built battery wedges for the submarines' batteries and countertops. In addition to his work in the shops, Peterson also worked on board the submarines located in the navigable waters of the Thames River, taking measurements of the boats' components for the purpose of constructing the models to conform to changes in the boats' design.

During the years that Peterson worked at Electric Boat, asbestos was used extensively in the construction of submarines, both in the shops shoreside and on the boats. In both the model and joiner shops, Peterson often assisted the laggers and pipefitters by cutting pallets of asbestos sheets. On board the submarines, the pipecoverers installed asbestos insulation on the piping. In addition,

welders and burners used asbestos products to protect major components. While on board the submarines, the model makers (such as Peterson) worked among the other tradesmen and as a result, could not avoid breathing in asbestos dust.

Peterson was diagnosed as having lung cancer in 1984 and died almost a month later. The family physician subsequently raised the question of whether asbestos exposure at Electric Boat contributed to the cause of the cancer. The link between the decedent's asbestos exposure and his lung cancer was confirmed in 1985 by Dr. David Kerns, Assistant Professor of Medicine at Brown University School of Medicine in Providence, R.I.

Mrs. Peterson timely filed a claim for disability benefits on behalf of her husband and a claim for death benefits as his surviving widow pursuant to 33 U.S.C. sec. 903(a). After a hearing, the Administrative Law Judge applied the LHWCA as it existed when Mr. Peterson was last exposed to asbestos in 1967 and denied the claims, finding that there was no "direct evidence" that the

decedent went on board submarines or was exposed to asbestos on a covered situs.[1]

In their appeal to the Benefits Review Board, the claimants argued that the jurisdictional requirements of section 3(a) as it existed in 1967 had been met as the record was replete with uncontradicted evidence that Peterson had been exposed to asbestos while workng aboard submarines upon navigable waters. The claimants also argued that the Administrative Law Judge's requirement of "direct evidence" to establish jurisdiction was a novel standard not required in Longshore cases.

In a rare *en banc* decision, the Benefits Review Board reversed the Administrative Law Judge's decision.

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[1]The Longshore Act as it existed in 1967 only applied to injuries occurring upon the navigable waters of the United States. *See Crowell v. Benson*, 285 U.S. 22 (1932). Prior to the 1972 amendments, the jurisdictional provision of the LHWCA read as follows:

> Compensation shall be payable under this Chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . .

33 U.S.C. sec. 903(a); 44 Stat. 1426 (1927).

The Board held that the applicable law as to situs is the law in effect on the date of injury. In an occupational disease case, the date of injury is the date on which the disease manifests itself, not the date of last exposure to the injurious stimuli. Therefore, the Act as amended in 1972 applied because the decedent's lung cancer did not manifest itself until 1984.[2] As Peterson met the definition of employee under the amended Act, 33 U.S.C. sec. 902(3), and was injured as a result of work done on a situs covered under 33 U.S.C. sec. 903(a) as amended, the Benefits Review Board awarded death benefits to Mrs. Peterson

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[2]In the 1972 amendments, Congress expanded the coverage of the LHWCA to include injuries occurring in shoreside areas as long as the status requirement of section 2(3) is met as well. Section 3(a), as amended in 1972, reads as follows:

> [C]ompensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel*).

33 U.S.C.S. sec. 903(a) (Law. Co-op. 1980 & Supp. 1991) (emphasis added).

and remanded the case to the Administrative Law Judge for calculation of disability benefits.[3]

INA and the Director of the United States Department of Labor's Office of Workers' Compensation Programs appealed the Board's decision to the United States Court of Appeals for the Second Circuit. A majority of the three-judge panel (Miner and McLaughlin, J.J.) denied INA's petition for review, holding that the Board correctly applied the law in effect on the date the disease manifested itself rather than the law in effect on the date of last exposure to the injurious stimuli.[4]

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[3]The petitioner does not dispute that the model and joiner shops fall within the definition, found in section 3(a) as amended, of "other adjoining area customarily used by an employee in . . . building a vessel".

[4]The claimant-respondents below argued that the Administrative Law Judge erred in denying jurisdiction under the Act as of 1967 when Peterson was employed. In holding that the LHWCA as amended in 1972 applied, neither the Board nor the Court of Appeals addressed the issue of whether the Administrative Law Judge's conclusion that the claimants failed to satisfy the jurisdictional requirements of the pre-1972 Act was supported by substantial evidence.

REASONS FOR DENYING CERTIORARI

This Court has previously stated that it will not grant the writ of certiorari

> except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). When this standard is applied to the instant case, it is clear that the petition should be denied because the decision of the court of appeals below is correct, does not conflict with the holdings of this Court or any other court of appeals, and does not present an important question for resolution by this Court.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

Every other court that has addressed the issue of which law is applicable in an occupational disease case brought under the LHWCA has ruled that the law in effect on the date the disease manifests itself rather than the law

in effect on the date of last exposure to the injurious stimulus governs the claim. *See SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990); *Castorina v. Lykes Bros. S.S. Co.,* 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985); *Newport News Shipbuilding and Dry Dock Co. v. Harris*, 934 F.2d 548 (4th Cir. 1990); *Railco Multi-Construction Co v. Gardner*, 902 F.2d 71 (D.C. Cir. 1990). Accordingly, there is no split among the circuits that would justify granting the petition for certiorari.

II. THE PETITION DOES NOT PRESENT ANY ISSUE OF GENERAL PUBLIC IMPORTANCE

The decision of the court of appeals involves the application of accepted legal principles to the facts and circumstances of this case. As INA admits in its petition,

> [t]his case involves private parties only. Mrs. Peterson is not acting in a role of a "private attorney general." She is pursuing private litigation under the LHWCA for her own benefit.

Petition for Certiorari, p. 9 (citations omitted).

As this Court "does [not] sit for the benefit of the particular litigants", *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), and as this case does

not require the resolution of principles of great importance to the public, *Layne & Bowler Corp., supra*, the petition for certiorari should be denied.

III. THE DECISION BELOW WAS CORRECT ON THE MERITS

The petitioner argues that applying section 3(a) of the Longshore Act as amended in 1972 to the facts of this case constitutes an impermissible retroactive application of law. In fact, applying the Act as amended in 1972 is a present application of law in effect on the date of injury.

It is well-established that the applicable law in both workers' compensation and third-party claims brought under the Longshore Act is that which is in effect on the date of injury. *Castorina*, 758 F.2d at 1029. In amending the LHWCA in 1972, Congress did not define when an injury occurs in an occupational disease case for the purposes of section 3(a), leaving it to the Benefits Review Board and the courts to flesh out the issue.

Prior to the 1972 amendments, case law had established that the date of injury in an occupational disease case is the date the disease manifests itself. *See*

Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). This interpretation was consistent with this Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949), which held that in an action based on occupational disease brought under the Federal Employers' Liability Act, 45 U.S.C. sec. 51 *et seq.*, the statute of limitations begins to run when the disease manifests itself:

> "[N]o specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves * * *."

Id. at 170 (quoting with approval *Associated Indemnity Corp. v. State Industrial Accident Commission*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)).

Congress amended section 13(a) of the Longshore Act in 1972 to incorporate this definition by also specifying the date of manifestation as the date when the statute of

limitations begins to run for filing a claim.[5] The Benefits Review Board consistently applied this interpretation until 1981. *See, e.g., Stark v. Bethlehem Steel Corp.*, 6 BRBS 600, 602-03 (1977), *reaff'd on reconsideration*, 10 BRBS 350 (1979); *Ward v. General Dynamics Corp.*, 9 BRBS 569, 571 (1978); *Keeler v. General Dynamics Corp.*, 7 BRBS 989, 991-92 (1978). In 1981, a divided Board reversed itself and held that the date of last exposure to the injurious substance should be the date of injury for the purpose of determining the average weekly wage under section 10 of the Longshore Act. *See Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981).

The last date of exposure approach (now urged by the Petitioner) was rejected by the Ninth Circuit for computing the average weekly wage in *Todd Shipyards*

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[5]Section 13(a) was amended in pertinent part to read as follows:

> The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C.S. sec. 913(a)(Law. Co-op. 1980).

Corp. v. Black, 717 F.2d 1280 (9th Cir.), *cert. denied*, 466 U.S. 937 (1984). The Ninth Circuit found *Dunn* to be "both ill-considered and contrary to the express purposes of the LHWCA," and held that for purposes of calculating the average weekly wage, an injury occurs in an occupational disease case when the disease manifests itself. *Black*, 717 F.2d at 1289. Congress quickly codified the Ninth Circuit's decision in *Black* by amending sections 10 and 12(a) in 1984.[6] In so amending these sections, Congress acknowledged that "[t]he first change to the body which results from exposure to a harmful physical agent or a toxic substance often is not disabling . . . [and] it is the disability which should trigger the compensation claim . . . ." H.R.

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[6]Section 10(i) now reads:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or the claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. sec. 910(i) (Law. Co-op. 1980 & Supp. 1991).

Rep. No. 98-570, Part 1, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2743.[7]

Since *Black*, four circuits in addition to the court below have held that the date of injury is the date of manifestation of the disease for the purpose of determining the applicable law in an occupational disease case.[8] In *Castorina*, the plaintiff longshoreman was last exposed to asbestos in May, 1972 (before the effective date of the amendments) and developed asbestosis in 1979. Pursuant to pre-1972 amendment law, Castorina brought an unseaworthiness claim against the defendant vessel owner under the general maritime law. The Fifth Circuit found section 905(b) as amended in 1972 to be applicable because the disease manifested itself after section 905(b)

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[7]*See also* House Conf. Rep. No. 98-1027, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2771, 2779-80.

[8]*See Newport News Shipbuilding and Dry Dock Co. v. Harris*, 934 F.2d 548 (4th Cir. 1990)(holding that the date of injury definition of section 10(i) was applicable for the purpose of determining entitlement to section 8(f) relief); *Railco Multi-Construction Co. v. Gardner*, 902 F.2d 71 (D.C. Cir. 1990)(holding that the law in effect at the time of manifestation governs the jurisdictional issue); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990); *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 474 U.S. 846 (1985).

came into effect. *Castorina*, 758 F.2d at 1031. As a result, it upheld the dismissal of the unseaworthiness claim because section 905(b) in 1979 precluded an action for unseaworthiness by longshoremen. As the court reasoned:

> a worker who is exposed to asbestos or similar fibers does not always contract pulmonary disease. The date of injury, therefore, is most realistically defined as the date that the disease actually manifests itself.

Id.

In a case with facts nearly identical to those in the instant proceedings, the Ninth Circuit recently held that section 3(a) as amended in 1972 applied to a compensation claim based on asbestosis that manifested itself after 1972 when the last exposure to asbestos occurred prior to the 1972 amendments. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990). The claimant in that case had worked as a brick mason helper for Oregon Ship from 1941 to 1942 in the construction of new ships in a building way on land near the Willamette River. His job did not require him to work on navigable waters. While working ashore, he was exposed to asbestos. In 1980, Johnson

became disabled from asbestosis. *Id.* at 1435-36. The Ninth Circuit held that the jurisdictional requirements of section 3(a) as amended in 1972 applied because the injury occurred when the disease's manifestation disabled the claimant in 1980, not on the last day of exposure to asbestos in 1942. *Id.* at 1440.

In so holding, the *SAIF* court relied on three factors. First, the court emphasized that failure to apply this interpretation to the date of injury would mean that claimants exposed to injurious substances shoreside prior to 1972 would remain entirely uncompensated for their work-related diseases which develop later. This would directly contravene the remedial purpose of the Longshore Act, which "'is to compensate workers for the loss of wage-earning capacity resulting from occupational injuries and diseases.'" *Black*, 717 F.2d at 1289, quoted in *SAIF Corp.*, 908 F.2d at 1439. This view is supported by the legislative history of section 3(a) as amended in 1972:

> The present Act . . . covers only injuries which occur "upon the navigable waters of the United States." . . . The result is a disparity in benefits payable for death or

> disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate . . .
>
> * * *
>
> The Committee believes that the compensation payable to the longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4707-08.

Second, the *SAIF* court noted that while the process of asbestosis may begin upon exposure, most people would not consider themselves to be injured until they become symptomatic. *Id.* at 1439. Similarly, the Second Circuit has recognized that the Longshore Act "is not concerned with pathology, but with industrial disability; and a disease is no disease until it manifests itself." *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 466 (2d Cir.), *cert. denied*, 308 U.S. 570 (1939).

Finally, the Ninth Circuit in *SAIF* reiterated the view expressed in *Black* that the trend has been to apply

the date of manifestation in a variety of actions involving occupational diseases with long latency periods. *SAIF Corp.*, 908 F.2d at 1439 (citing cases).[9] The court took the position that the codification of the date of manifestation approach in sections 10, 12, and 13 of the Longshore Act established that trend even further. *Id.* In the proceedings below, the Benefits Review Board found the reasoning in *SAIF Corp.* to be so compelling, it sat *en banc* and adopted the Ninth Circuit's decision for all circuits.

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[9] In holding that the Nevada Occupational Disease Act as amended in 1967 provided the exclusive remedy to a claim brought under the Federal Tort Claims Act as a result of multiple myeloma from exposure to radiation between 1951 and 1963, the Nevada district court reasoned that the law in effect at the time of disability governs the claim because that is when the claimant's rights vest and the cause of action accrues. *Prescott v. United States*, 523 F. Supp. 918, 926 (D. Nev. 1981), *aff'd*, 731 F.2d 1388 (9th Cir. 1984). The court noted that this approach has been followed for occupational disease claims brought under other acts as well, such as the Colorado Occupational Disease Act:

> [T]he law which governs the rights and liabilities of the parties is that in force at the time of the disability and death . . . and the application of the law then in effect does not involve a retroactive application of that law.

Tucker v. Claimants in Death of Gonzales, 546 P.2d 1271, 1275 (Colo. App. 1976), quoted with approval in *Prescott*, 523 F. Supp. at 927.

The concept of the date of injury is critical in four sections of the Act. In section 3(a), it establishes when a claim arises under the Act. In section 10(i), it is a crucial element in calculating the claimant's compensation rate. Sections 12(a) and 13(a) use the date of injury to trigger the notice and filing requirements. As the Board noted in *Dunn*, *supra*, the general rule of statutory construction is that the same terms in the same statute are subject to the same interpretation unless there is reason to conclude that Congress intended otherwise:

> [T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) (citations omitted), quoted in *Dunn*, 13 BRBS at 655. The Board in *Dunn* nevertheless attempted to find such variation to justify its holding:

> We conclude that there is such a "variation in the connection" of the ways in which "injury" and especially "time of injury" are used in the Act that application of a single definition of "time of injury" would denigrate the purpose behind some of the provisions of the Act. . . . The various sections [of the Act] were obviously intended by Congress to implement the various concepts of worker's compensation which must be applied to each case. It is clear, for example, that the considerations which led to the adoption of the "manifestation" rule in Section 13(a) cases are not applicable to Section 10.

Dunn, 13 BRBS at 655 (footnote omitted).

Congress's response to *Dunn* dispelled any such interpretation. In amending section 10 to incorporate the date of manifestation approach, Congress sought "to insure that [occupational] disease victims receive compensation benefits which are adequate to their current needs." H.R. Rep. 98-570, 1984 U.S. Code Cong. & Ad. News at 2743. The Committee noted that the date of injury has little applicability to occupational diseases unless the date of manifestation is used. Otherwise, the statute of limitations would run out years, or frequently decades, before a worker even realized he had a work-related disease. Similarly,

only by applying the date of manifestation in determining the loss of wage earning capacity could the compensation benefits "be in an amount which is reasonable to the needs of the victim." *Id.* at 2745. Unless the date of manifestation is used in section 3(a), workers such as Peterson would remain inadequately compensated for their work-related diseases when Congress specifically intended to remedy this problem by amending section 3(a) in 1972. The legislative histories of the 1972 and 1984 amendments make it clear that the will of Congress can only be carried out if the time of injury is given the same meaning -- the date of manifestation -- throughtout the Act.

In reaching its decision that the date of injury is the date of manifestation, the court below found the Ninth Circuit's analysis to be persuasive and noted that it is consistent with the rule established by the Second Circuit prior to the 1972 amendments that the statute of limitations does not begin to run until the disease manifests itself. *See* majority opinion, p. 12, citing *Travelers Ins. Co. v.*

Cardillo, 225 F.2d 137, 142-43 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

Further, the court below reasoned that its ruling is consistent with the decisions applying the 1972 amendments to section 9 of the Act, 33 U.S.C. sec. 909, relating to death benefits. *See, e.g., State Ins. Fund v. Pesce*, 548 F.2d 1112 (2d Cir. 1977); *Puig v. Standard Dredging Corp.*, 599 F.2d 467 (1st Cir. 1979). In those cases, the employers had urged the same retroactivity argument maintained by INA in the instant proceedings.

Prior to the 1972 amendments, the Longshore Act provided for payment of death benefits to the surviving spouse and children only if the death was related to the compensable injury. As amended in 1972, section 9 made death benefits payable not only if the compensable injury caused death, but also when a permanently and totally disabled employee died of causes unrelated to his work injury.

In a case where the decedent became permanently and totally disabled due to a work-related injury in 1964

and died of unrelated causes in 1975, the employer argued that awarding death benefits to the surviving widow constituted an impermissible retroactive application of law in effect at the time of death and that the court should have applied the law in effect at the time of disability. *See Puig, supra.* The First Circuit rejected this argument and noted that the same argument had been rejected by courts awarding death benefits pursuant to the death benefits amendment of 1948. In addition, the court found unpersuasive the petitioners' argument that the 1972 amendment was different because it created a new and different class of beneficiaries:

> While the insurance carriers cannot be faulted for lack of persistence, their arguments have been and continue to be unpersuasive.
>
> Since we adopt the reasoning of our sister circuits that the amendment is not retroactive, petitioners' argument as to congressional intent is irrelevant.
>
> * * *
>
> [B]ecause the right to death benefits under the Act arises only upon death, and is separate from the right to disability benefits which arises when the employment injury occurs, application of the 1972 section 909 amendment in a case where, as here, death

> occurred after the amendment's effective date is a prospective application.

Id. at 470.

As the court below recognized, in both situations, the applicable law is that which is in effect on the date the cause of action accrues:

> Under the terms of the Act itself, the cause of action does not arise until disability or death occurs. 33 U.S.C. sec. 903(a). Thus, there can be no justification for applying the law in effect at the moment of last exposure, because at that time, even if the situs requirement were met, Peterson was not entitled to invoke the Act or maintain a suit thereunder until his injury resulted in disability or death.

Majority opinion, pp. 13-14. As the date of injury in this case is the date of manifestation of the disease in 1984, applying section 3(a) as amended in 1972 is not a retroactive application of law but rather a present application of the law in effect on the date the cause of

action accrued.[10]

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[10]Assuming, *arguendo*, that applying section 3(a) as amended in 1972 is a retroactive application of law, such an application is clearly permissible given this Court's ruling in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Usery* dealt with the application of the Black Lung Benefits Act of 1972 to claims filed by former coal miners who stopped working in the mines prior to the effective date of the statute:

> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect -- although, as we have noted, the Act imposed no liability on operators until 1974. And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.
>
> * * *
>
> We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . .

Id. at 15-17 (footnotes omitted).

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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